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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1226

MARY LOUISE GRUMBLES, Joined by her Husband, M. W. GRUMBLES; CATHRYNE S. HUDGINS, Joined by her Husband, B. R. HUDGINS; and ROBERT HUDGINS,
Petitioners,

v.

THE TIMES HERALD PRINTING COMPANY and JOHN W. RUNYON, CLYDE W. REMBERT, and JAMES F. CHAMBERS, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company, Dated December 15, 1960,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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March 29, 1968.

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RESPONDENTS' BRIEF IN OPPOSITION

To the Supreme Court of the United States:

OPINION BELOW

The opinion of the Fifth Circuit is reported at 387 F.2d 593 and is copied in Appendix "A" to the Petition for Writ of Certiorari.

THE NATURE OF THE CASE, THE JURY'S FINDINGS, AND PETITIONERS' FAILURE TO PRESERVE ERROR

The Petition for Writ of Certiorari seeks to overturn four separate jury findings of fact. Any one of these jury findings will support and compel the judgments of the courts below, that Petitioners take nothing from Respondents. None of the findings was complained of by Petitioners in the trial court. Each and all of them have been sustained by both the trial court and the Court of Appeals.

In 1961, Respondents purchased Petitioners' 8.9% interest in The Times Herald Printing Company for a consideration of $1,546,020.00 ($30.00 per share). In 1966, Petitioners brought this suit in the United States District Court for the Northern District of Texas, seeking damages or, alternatively, rescission of the sale (R. 550.) Petitioners' sole theory of recovery was and is the contention that Respondents, to Petitioners' damage, were guilty of a violation of Rule X-10B-5, Securities and Exchange Commission, *17 C.F.R. 240.10B-5.*[1] Speci-

[1]Rule X-10B-5 reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."
(17 C.F.R. 264.)

fically, it was alleged that Respondents had fraudulently omitted to advise Petitioners of material facts in connection with the sale — towit, the existence of "certain definite offers *** to purchase all or a portion of the company stock at prices far in excess of $30.00 per share" (R. 567) — and that, if Respondents had told Petitioners of such offers, Petitioners would not have sold their stock in 1961 but would have sold it "later" at $54.50 per share. (R. 569.) Respondents denied Petitioners' charges and pleaded the statute of limitations. (R. 572-576.)

At the trial, the "certain definite offers" alleged in Petitioners' pleadings turned out to be (1) an offer by S. I. Newhouse, evidenced by a letter of May 1, 1961, to buy 100% of the Company's stock for $25,000,000.00 ($43.47 per share) or, if 100% could not be delivered, to buy at least 51% or more of such stock at the same price per share, which offer had been promptly rejected by the holders of more than 51% of the stock, and (2) an offer claimed to have been made by one John C. Mullins, which "offer" is now out of the case because the jury found that it never existed (Special Issue No. 1B) and Petitioners have not challenged the finding.

The case was submitted to the jury on special interrogatories, as provided for by *Rule 49(a), Federal Rules of Civil Procedure.* The jury found that the Newhouse offer was made (Special Issue No. 1A) and

was not disclosed to Petitioners (Special Issue No. 2), but also found that the failure to advise Petitioners of such offer to buy no less than 51% of the Company, already rejected by more than 51% of its stockholders, was not a "material fact" in connection with the sale of Petitioners' 8.9% interest (Special Issue No. 3), that the non-disclosure of such offer was not relied upon by Petitioners in selling their stock for $30.00 per share (Special Issue No. 4), that Petitioners were not damaged by such nondisclosure (Special Issue No. 5), and that Petitioners, in the exercise of reasonable care, should have learned of the Newhouse offer on or before May 20, 1961, more than four years and eight months before they filed this suit (Special Issue No. 7). (R. 592-594.)[2] Thus, the jury found in favor of Respondents and against Petitioners upon each of the three essential elements of Petitioners' prima facie case — materiality, reliance, and damages — and also upon Respondents' defense of limitations.

Inasmuch as Petitioners now complain that "the issue of reliance should not have been submitted" and that the charge "deprived petitioners of a proper finding of their damages" (Petition for Writ of Certiorari 2), we call attention to the following. By Special Issues Nos. 3, 4, and 5, the trial court submitted interrogatories to the jury on materiality, reliance, and damages. (R. 592-594.) Petitioners' requested charge, though phrased somewhat differently from that of the court, also contained special interrogatories on materiality,

[2] Special Issue No. 6, submitted conditionally upon an affirmative answer to Special Issue No. 5, was not answered.

reliance, and damages. (R. 580-582.) When Petitioners were asked for their objections to the court's charge, only the following took place:

> "THE COURT:
>
> "Mr. Billings, do you have any objection to the Charge?
>
> "MR. BILLINGS:
>
> "Yes, Your Honor, Special Issue Number 4 we would object to and ask the Court to submit the special issue on reliance which was contained in our requested Charge, which was phrased somewhat differently.
>
> "Plaintiffs would object also to the submission of Special Issue Number 7 in that there was no evidence to raise this particular issue.
>
> "That's all the objections we have." (R. 24.)

Although Petitioners now claim that the answers to Special Issues Nos. 3 and 7 are contrary to the evidence, they made no motion for directed verdict or motion for judgment n.o.v., in the trial court.[3]

The trial court entered judgment on the verdict that Petitioners take nothing from Respondents. (R.596-597.) Petitioners appealed, contending that the verdict was contrary to the evidence,[4] but the Fifth Circuit affirmed.

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[3] By alleging that the trial court committed "fundamental errors" (Petition for Writ of Certiorari 15), Petitioners tacitly recognize the difficulties confronting them on appeal. "Fundamental error" is the term given by the Texas courts to that rare species of error which may be assigned in the appellate court even though not preserved below. *State v. Sunland Supply Co., 404 S.W.2d 316, 319 (Tex. Sup., 1966).*

[4] Petitioners also claimed on appeal that certain evidentiary rulings by the trial court were erroneous. The Fifth Circuit held that the rulings, if error at all, were harmless, and Petitioners do not here complain of that holding.

QUESTIONS PRESENTED

In this Court, Petitioners do not deny that the jury findings on reliance and damages are supported by the evidence or that the special interrogatories on materiality and limitations are in proper form. Petitioners' only complaints (see the "Question Presented" section at Petition for Writ of Certiorari 2) are (1) that the jury's answers to the special interrogatories on materiality and the statute of limitations are contrary to the evidence, and (2) that the special interrogatories on reliance and damages were subject to objection. Thus, the questions presented by the Petition for Writ of Certiorari are as follows:

(1) Will this Court grant certiorari to review the jury's answers to two special interrogatories, when those answers have been concurred in by both the trial court and the Court of Appeals, when Petitioners have made no motion for directed verdict and no motion for judgment n.o.v. in the trial court, and when the judgments below are sustained by other jury findings which concededly have support in the evidence?

(2) Will this Court grant certiorari to review the language of two of the special interrogatories upon which the case was submitted to the jury, when Petitioners did not make any objection to those interrogatories in the trial court, and when the judgments below are sustained by answers to other special interrogatories not objected to here?

STATEMENT

The following summary of this 598-page record is necessary, as the Petition for Writ of Certiorari omits to mention much material evidence.[5]

As of 1961, Petitioner Mrs. Grumbles, her sister Petitioner Mrs. Hudgins, and her nephew Petitioner Robert Hudgins each owned 17,178 shares of stock in The Times Herald Printing Company, a total of 51,534 shares, 8.9% of the Company's 575,045 outstanding shares. (R. 46, 70, 126; Defendants' Exhibits Nos. 10(a) and 10(b).) Early in that year, Petitioners, on the advice of Robert Hudgins, then a finance student in college, decided to sell their Times Herald stock in an effort to diversify their investments. (R. 137).

There was then (as now) no public market for the stock. (R. 230.) Robert Hudgins first attempted to appraise his family's interest and concluded that it was worth $30.00 per share (R. 146-147), but he felt that someone with more experience should be consulted (R. 129), so Mr. J. W. Hickman, an investment banker since 1928 and President of the Dallas brokerage firm of Schneider, Bernet & Hickman (R. 228-229) was employed by Petitioners to make an appraisal and negotiate a sale of Petitioners' interest. (R. 232.) Pe-

[5] The summary may be condensed by omitting any reference to the alleged offer by John C. Mullins, since Petitioners do not now contend that such an offer was ever made.

titioners agreed to pay Mr. Hickman ¾ of 1% of the sale price, if he effectuated a sale; otherwise, he was to be paid a fee of $2,500.00 (R. 232, 239.) Thus, as Petitioners understood, the larger the price for which Mr. Hickman could negotiate a sale of Petitioners' interest, the greater would be his commission. (R. 57.)

Mr. Hickman and an associate proceeded to make an extensive investigation of The Times Herald Printing Company. (R. 235-238.) As Mr. Hickman demonstrated on the witness stand, he is fully acquainted with matters of corporate management. (R. 234-235.) Petitioners did not tell Mr. Hickman what to consider in his investigation, for "he was in the business," as Robert Hudgins said (R. 144), and Petitioners relied upon his judgment as to what considerations would be relevant. (R. 61, 66, 78.) On June 7, 1961, Mr. Hickman furnished Petitioners with a 36-page written report (Plaintiffs' Exhibit No. 8), which, after exploring such matters as the characteristics of the industry, the Company's business, its ownership, management, financial condition, and operating record, its stock's price/earnings ratio, book value, and dividend rate, and the considerations involved in a private placement as opposed to public marketing, concluded with the explicit assertion that Petitioners' 8.9% minority interest "could not be sold for more than" $30.00 per share. (R. 64, 241-244.) This was 13.6 times the Company's average per share earnings for the previous five years. (R. 244.)

Petitioners were satisfied with Mr. Hickman's report and decided to go ahead with the sale. (R. 149.) Mr. Hickman, as Petitioners' agent, "talked to" one outside investor as a potential buyer, and then, in June 1961, made The Times Herald Printing Company a firm offer to sell Petitioners' stock to the Company for $30.00 per share, the price specified in Mr. Hickman's appraisal. (R. 238, 298.) The offer was accepted, and Respondents Runyon, Rembert, and Chambers purchased the stock as Trustees. (R. 238, 298, 312.)*

During his investigation, Mr. Hickman and his associate had numerous visits with officials of The Times Herald Printing Company. Mr. Hickman testified that, insofar as possible, such officials furnished him with all the information he requested. (R. 235.) He recalled that, on several occasions, he and the Company officials had discussed, in general terms, the desirability of owning a company such as the Times Herald, but it was his duty to appraise and sell an 8.9% minority interest, and, therefore, knowing that "people will pay more for the control of a corporation in purchasing stock than they will for lesser interests" (R. 248), he was not concerned with and did not inquire whether there had ever been any offers to buy 51% or more of the Company. (R. 246.) Respondents did not mention

* Respondents Runyon, Rembert, and Chambers thereupon transferred 23,667 of the 51,534 shares to the Company's Retirement Pension Trust, and transferred the remaining 27,867 shares to the treasury of the Company, all at the same price of $30.00 per share they had paid Respondents. (R. 467.)

any such offers to Mr. Hickman: they were not securities experts, they knew Mr. Hickman was, and they did not know what factors Mr. Hickman intended to consider in making his appraisal. (R. 247, 341, 342.) Petitioners admitted they had no reason to believe Respondents would not have given them or Mr. Hickman such information, if it had been asked for. (R. 60, 150-151.)

Petitioners now claim, however, that they are entitled to damages or rescission because Respondents did not tell Mr. Hickman of a certain offer by S. I. Newhouse, owner of a large number of radio and TV stations and newspapers. (R. 195.) Mr. Newhouse had been interested since 1959 in acquiring control of The Times Herald Printing Company; in that year he had made and the controlling stockholders had rejected an offer to purchase at least 80% of the stock. (R. 211.) On May 1, 1961, his interest renewed, he tendered the offer now relied upon by Petitioners — a letter which stated that, assuming there had been no substantial changes in the Company's condition since 1959, he would "pay $25,000,000 for one hundred percent of its stock," or, failing that, "would accept fifty-one percent or more, on a proportionate basis." (R. 285.)

At a meeting on May 20, 1961, the Company's board of directors considered Mr. Newhouse's offer, recorded their unanimous opposition to it, and voted to recommend that the stockholders "approve this expression of the unanimous view of the Board of Directors and

authorize the Board of Directors formally to reject said offer." (R. 305-307.) In order to obtain such authorization, however, the directors did not have to contact all of the stockholders; since the persons who owned more than 51% of the Company were not interested in selling,[1] it became immediately apparent that the offer could not be met. (R. 169, 287, 321, 324, 459.) Mr. Newhouse had never made any offer for, and specifically testified that he did not want, less than 51% of the Times Herald. (R. 223.)

Thus, the offer claimed by Petitioners to be a "material fact" in connection with the sale of their stock was a rejected offer to purchase not less than 51% of The Times Herald Printing Company. Mr. Hickman himself, called as a witness by Petitioners, testified that he did not consider such an offer "as being material" to the value of Petitioners' 8.9% interest. (R. 249-250.) Another securities expert, E. O. Cartwright, senior vice president of Merrill Lynch, Pierce, Fenner & Smith (R. 394), also testified that the Newhouse offer was not material in connection with the sale of Petitioners' shares. (R. 401.)

As the foregoing summary shows, Petitioners' assertion, that "[w]hile other stockholders were advised, the Petitioners were not informed of the offer, or the Board's action" (Petition for Writ of Certiorari 4),

[1] John Runyon, Mrs. Lula Gooch, Clyde Taber, and Mrs. Ruth DeVarney together owned 52.33% of the stock (R. 456), and none of them wanted to sell. (R. 164, 354, 439, 449, 499, 522.)

does not recite all the facts which were before the jury. Neither the offer nor the board's action was concealed from Petitioners. Indeed, at the time of such offer and meeting, Petitioners' expert Mr. Hickman was investigating the Company, and the minutes of the May 20 directors' meeting, and of all other directors' meetings, were available for his inspection as Petitioners' agent. (R. 338.) It is undisputed that Respondents gave Mr. Hickman all the available information he asked for. (R. 235.)

Petitioners offered no evidence in support of their pleaded claim that if they had known of Mr. Newhouse's offer they would have retained their stock and "later sold it for at least $54.50 per share" (R. 569). On the day the trial began, they filed a "Supplement to First Amended Complaint," which alleged that the "true value of their stock" was "not less than $52.00 per share on June 21, 1961" (R. 580), but they did not present evidence in support of this allegation. Both Mr. Hickman and Mr. Cartwright testified that $30.00 per share was a fair price for Petitioners' 8.9% minority interest. (R. 249, 400.)

ARGUMENT

In order to obtain a reversal of the judgments below, Petitioners must overcome each and every one of the four controlling jury findings against them (Special Issue No. 3, materiality; Special Issue No. 4, reliance; Special Issue No. 5, damages; and Special Issue No.

7, limitations). We need examine only briefly the arguments by which they attempt to do this.

I. Special Issue No. 3: Materiality.

The first and complete answer to Petitioners' claim, that materiality was established as a matter of law and should not have been submitted to the jury, is that Petitioners are procedurally foreclosed from so contending, for they made no motion for directed verdict in the trial court. As noted in *2B Barron & Holtzoff, Federal Practice and Procedure, § 1081 (Rev. Ed., 1961):*

> "It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court. There are sound reasons for this rule. The party who makes no motion for a directed verdict must be of the view that the evidence makes a case for the jury and should not be permitted to impute error to the court for sharing that view. The appellate court, therefore, is powerless to review the sufficiency of the evidence to support the verdict if the appellant made no motion for a directed verdict." (2B Barron & Holtzoff 424-425.)

The Fifth Circuit, to which the present case was appealed, has many times so held. See *Pennsylvania National Mutual Cas. Ins. Co. v Nathan, 361 F.2d 18, 20 (5 Cir., 1966)*, and the numerous authorities cited therein.

Apart from that, however, Petitioners' argument must fail on its merits. Mr. Hickman, Petitioners' agent

and Petitioners' expert witness, explicitly stated that the Newhouse offer was not material to the value of Petitioners' interest (R. 249-250), and his opinion was corroborated by the only other securities expert who testified. (R. 401.) This, to say the least, "is an evidentiary basis for" the answer to Special Issue No. 3, requiring that such answer be upheld on appeal, *Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740 (1946)*. Moreover, such answer is in accord with simple common sense. A fact is not material, under *Rule X-10B-5*, unless "in reasonable and objective contemplation" it is likely to affect the value of the plaintiff's stock. *List v. Fashion Park, Inc., 340 F.2d 457, 462 (2 Cir., 1965), cert. den., 382 U.S. 811, 86 S.Ct. 23 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir., 1963)*. Certainly, a jury can conclude that an offer to buy not less than 51% of a corporation, which offer has been unequivocally turned down by more than 51% of the stock ownership, does not in reasonable and objective contemplation affect the value of an 8.9% interest. Petitioners cite no testimony in this record to the contrary.[8]

Petitioners urge that if they had known of the Newhouse offer they could have (1) inquired of Mr. New-

[8] As noted at Petition for Writ of Certiorari 6, a recent text, without assigning any reasons for its conclusion, describes the jury's answer to Special Issue No. 3 in this case as "dubious." *Bromberg, Securities Law: Fraud § 8.3 (1967)*. Professor Bromberg does not say or suggest, however, that such answer should be set aside on appeal (let alone that this should be done in the absence of a motion for directed verdict); on the contrary he appears to recognize that the finding was warranted by the trial court's definition of "material" (R. 591), to which definition, as he observes, Petitioners did not object. *Ibid.*

house if he wished to buy their 8.9% interest, or (2) attempted to persuade other stockholders to join them in a sale of 51% or more of the stock to Mr. Newhouse, or (3) demanded more than $30.00 per share when they sold their stock; from these premises (and from these premises alone) Petitioners, entirely disregarding their own expert's contrary testimony, find it "inescapable" that the Newhouse offer was material to the sale of their interest. (Petition for Writ of Certiorari 9.) To this it may be answered that (1) Mr. Newhouse was not interested in buying Petitioners' or any other minority interest (R. 223), that (2) the holders of more than 51% of the stock were not interested in selling (R. 164, 354, 439, 449, 522), and that (3) there is no evidence any one was willing to pay more than $30.00 per share for Petitioners' interest — indeed, no evidence that any one other than the Company wanted to buy it at all. (R. 238.) The point now, however, is that Petitioners' argument is, at best, a line of reasoning which the jury perhaps might have accepted but did not; it was the jury's right and duty — indeed, the "very essence" of its function — "to select from among conflicting inferences and conclusions that which it considers most reasonable," *Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 526, 76 S.Ct. 608 (1956)*, and the jury has resolved this factual controversy in favor of Respondents. On appeal, the Court may consider only the evidence and inferences which support the jury's verdict. *Continental*

Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82 S.Ct. 1404 (1962); Berry v. United States, 312 U.S. 450, 452-453, 61 S.Ct. 637 (1941).

Petitioners also claim that Respondents "admitted 'the importance' " of the Newhouse offer in the minutes of the May 20, 1961 directors' meeting. (See Petition for Writ of Certiorari 9.) There is, however nothing in those minutes or elsewhere in the evidence which in any way indicates that Respondents believed the Newhouse offer to be important to the purchase and sale of Petitioners' stock. The evidence plainly shows that, when the majority stockholders made it clear they would not sell, Respondents ceased to regard the offer as having any importance at all, because they knew it could never be met; this, the Company's president testified, is why the offer was not mentioned to Petitioners. (R. 324.)[9] The jury, exclusive judge of the credibility of the witnesses, *Sartor v. Arkansas Gas Corp., 321 U.S. 620, 628, 64 S.Ct. 724 (1944); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 720 (1891)*, was entitled to believe this perfectly reasonable explanation, and apparently it did so.

As Petitioners admit, "materiality is clearly an element" of their proof. (Petition for Writ of Certiorari

[9] Petitioners pleaded that Respondents' failure to mention the Newhouse offer was "willful and deliberate, and misled plaintiff stockholders into selling their stock interest in the Defendant company at far less than its true value." (S. F. 568.) The evidence shows, however, that at the time the Newhouse offer was made and rejected, Petitioners had not even formally offered their stock to Respondents. (R. 238.) There is no evidence of any fraudulent intent on the part of Respondents, and this is nowhere better demonstrated by the fact that Petitioners did not even try to prove or obtain jury findings on common law fraud. They predicated their suit entirely upon Rule X-10B-5, which does not require proof of fraudulent intent, and they still were not able to obtain a verdict.

6.) The jury has resolved it against them. This Court does not redetermine a fact found by the jury, *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, 369 U.S. 355, 359, 82 S.Ct. 780 (1962);* certainly, it should not do so when, as here, the finding has the concurrence of both the trial court and the Court of Appeals. *Berenyi v. District Director, Imm. & Nat. Serv., 385 U.S. 630, 635, 87 S.Ct. 666 (1967).*

II. Special Issue No. 4: Reliance.

In answer to Special Issue No. 4, the jury found that, in selling their stock for $30.00 per share, Petitioners did not rely upon the non-disclosure of the Newhouse offer. (R. 593.) Neither in the trial court, the Court of Appeals, nor this Court have Petitioners denied that this finding has full support in the evidence. Indeed, at the trial, Petitioners themselves admitted that their reliance was, not upon anything Respondents did or did not do, but upon the expertise of Mr. Hickman (R. 78, 123, 153), who himself testified that he did not consider the Newhouse offer to be material to his appraisal of Petitioners' stock. (R. 249, 250.) Petitioners were "not required to search out details that presumably would not influence the person's judgment with whom they [were] dealing." *Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir., (1963).*

Petitioners contend that the wording of Special Issue No. 4 is unclear (Petitioner for Writ of Certiorari 11), but they suggest no way the jury could have been misled, and we can think of none. Moreover, since this objection was not made in the trial court (or, indeed, in

the Court of Appeals) it cannot be assigned here. *Rule 51, Federal Rules of Civil Procedure; Palmer v. Hoffman, 318 U.S. 109, 119, 63 S. Ct. 477 (1943); Guest House Motor Inn, Inc. v. Duke, 384 F.2d 927, 928 (5 Cir., 1967).*

Nor may Petitioners obtain reversal by claiming now (Petition for Writ of Certiorari 10-12) that they should not have been required to prove reliance at all. In the trial court, Petitioners not only failed to object to the charge on that basis, they tendered the trial court a requested charge which itself would have required them to prove reliance. (R. 581-582)." A party may not allege error in the court's charge when the matter complained of is found in his own requested charge. See *Solomon Dehydrating Company v. Guyton, 294 F.2d 439, 445 (8 Cir., 1961), cert. den., 368 U.S. 929, 82 S.Ct. 366(1961)*, and the many cases there cited.

We should add, however, that, in the type of action alleged by Petitioners, reliance clearly was an element of their proof. It is true, as Petitioners observe, that Rule X-10B-15 "does not by its terms require 'reliance' to be proved" (Petition for Writ of Certiorari 10), but neither does the Rule by its terms give rise to a private civil action. When, as here, the plaintiff has full access

[9] Petitioners asked that the trial court "submit *the special issue on reliance* which was contained in our requested Charge" instead of Special No. 4. (R. 24, emphasis added.) It would seem, incidentally, that Special Issue No. 4 is more favorable to Petitioners than their own requested charge: Special Issue No. 4 inquires only whether Petitioners *relied* upon the non-disclosure in selling their stock for $30.00 per share (R. 593), whereas Petitioners' requested interrogatory on reliance would have required Petitioners to prove that *but for* such non-disclosure Petitioners would not have sold their stock for 30.00 per share. (R. 582.)

to all information in the defendant's possession, but seeks damages or rescission because the defendant failed to mention a fact to him, it is only reasonable that the plaintiff should prove, and the prevailing case law is that he must prove, that he "would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact." *List v. Fashion Park, Inc., 340 F.2d 457, 463 (2 Cir., 1965), cert. den., 382 U.S. 811, 86 S.Ct. 23 (1965).* As said in *III Loss, Securities Regulation, 1766 (2d Ed., 1961),* "it is difficult not to think in terms of reliance as inherent in the very theory of the action when there is no misstatement complained of but merely a breach of a duty to speak." See also *Janigan v. Taylor, 344 F.2d 781, 786, (1 Cir., 1965), cert. den., 382 U.S. 879, 86 S.Ct. 163 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir., 1963); Connelly v. Balkwill, 174 F.Supp. 49, 59 (D.C. Ohio, 1959), aff., 279 F.2d 685 (6 Cir., 1960); Reed v. Riddle Airlines, Inc., 266 F.2d 314, 319 (5 Cir., 1959).*

III. Special Issue No. 5: Damages.

Petitioners having alleged that they were damged (R. 569), were properly required to prove it, and this they have never denied. Nor have Petitioners ever in any court (including this one) challenged the jury's answer to Special Issue No. 5 (R. 593-594) that they were not damaged.[11]

[11] Both Mr. Hickman and Mr. Cartwright, securities experts, testified that, at $30.00 per share - which, it will be recalled, was 13.6 times earnings (R. 244) — Petitioners received a fair price for their stock from Respondents, who were the only persons interested in buying it. (R. 249, 440; 238.)

At Petition for Writ of Certiorari, 12-13, Petitioners advance objections to Special Issue No. 5 and to Special Issue No. 6 (which latter Issue was not answered by the jury), but they do not point to any evidence, logic, or authority which could support such objections, and, since the objections were not made in the trial court, they cannot be considered here. *Rule 51, Federal Rules of Civil Procedure.*

IV. Special Issue No. 7: Limitations.

As Petitioners do not and cannot deny, a civil action under Rule X-10B-5 is subject to the defense of limitations. *Bromberg, Securities Law: Fraud, §2.5(1) (1967).* The applicable limitation period is that fixed by the fraud statute of the state in which the federal court sits—two years in Texas, *Quinn v. Press, 135 Tex. 60, 64, 140 S.W.2d 438, 440 (1940)* — and begins to run when the fact allegedly concealed should reasonably have been discovered. *Hooper v. Mountain States Securities Corporation, 282 F.2d 195, 205, 206 (5 Cir., 1960), cert. den., 365 U.S. 814, 81 S.Ct. 695 (1961).* Petitioners brought their suit on January 21, 1966. (R. 550.)[12] The jury found that Petitioners could reasonably have discovered the existence of the Newhouse offer on May 20, 1961 (Special Issue No. 7, R. 594), more than four years and eight months before the suit was filed. Thus, another of the many reasons why Petitioners cannot

[12] Therefore, the trial court correctly stated the law in its instruction (complained of now for the first time in any court at Petition for Writ of Certiorari 13-14) that Petitioners could not recover if it were found by a preponderance of the evidence that they knew or in the exercise of reasonable care should have known of the offer prior to January 21, 1964. (R. 591.)

prevail here is that, by the answer to Special Issue No. 7, the jury has found that their action is barred by limitations and both courts below have concurred in that finding.

Petitioners' present claim that the answer to Special Issue No. 7 was without support in the evidence, is foreclosed by their failure to move for a directed verdict (see *2B Barron & Holtzoff, Federal Practice and Procedure, §1081 (Rev. Ed., 1961)*, quoted at page 13 of this Brief) and is without merit. The Times Herald Printing Company's board of directors met and considered the Newhouse offer on May 20, 1961, and recorded full details thereof in the minutes of such meeting. (R. 305.) At that time, Petitioners were considering a sale of their Company stock for in excess of $1,500,000.00, and an expert of more than thirty years' experience, fully acquainted with the importance of corporate minutes (R. 228, 234), was actively engaged in investigating the Company. Certainly, the jury was entitled to conclude that, in the exercise of ordinary care, either Petitioners or their expert or both should have made an up-to-date examination of the Company's minutes and that, if they had done so, they would have learned, for whatever the information would have been worth to them, of the Newhouse offer.

CONCLUSION

The judgments below that Petitioners take nothing from Respondents, are supported and compelled by each of four separate jury findings, all concurred in by

both the trial court and the Court of Appeals. To obtain relief here, Petitioners would have to overcome each and all of these findings. They do not and cannot show that even one of them lacks evidentiary support or that there was any error (let alone prejudial error) in the charge. Moreover, since Petitioners made no motion for directed verdict and no objections to the charge, the jury findings and the charge are procedurally beyond attack.

After a fair trial, the jury, in accordance with its prerogative and duty under the Seventh Amendment, has decided the controlling facts of this case against Petitioners. There, the litigation should end. Petitioners have shown nothing, and there is nothing that could begin to justify review by the Supreme Court of the United States. Respondents pray that certiorari be denied.

Respectfully submitted,

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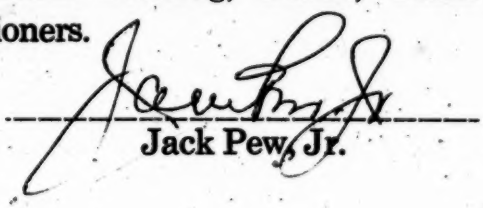
PROOF OF SERVICE

I, Jack Pew, Jr., one of the Counsel for Respondents, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 29th day of March, 1968, I served a copy of the foregoing Respondents' Brief in Opposition by mailing a copy in a duly addressed envelope, with first class postage prepaid, to William F. Billings, Billings, Pierce, Gilley & Stanton, 3030 Fidelity Union Tower, Dallas, Texas 75201, and Robert A. Fanning, Fanning & Harper, 40th Floor First National Bank Building, Dallas, Texas 75202, Counsel for Petitioners.



Jack Pew, Jr.